

**ARKANSAS COURT OF APPEALS**  
NOT DESIGNATED FOR PUBLICATION  
DIVISION III

CA05-555

March 15, 2006

SHAONA MIZELL

APPELLANT

APPEAL FROM THE POINSETT  
COUNTY CIRCUIT COURT  
[NO. PR-2003-100]

V.

HON. LARRY B. BOLING,  
JUDGE

EARLENE COUEY, ET AL.

APPELLEES

AFFIRMED

JOHN MAUZY PITTMAN, Chief Judge

This case involves the guardianship of N.C., a girl who was eleven and one-half years old at the time of the hearing. The paternal grandmother sought a guardianship, alleging that she had cared for the child for most of her life; that the mother had removed the child and interfered with their relationship; and that the mother was unfit. The trial court found the mother to be unfit and granted the guardianship petition. On appeal, the mother argues that the trial court erred in finding her to be unfit. We find no error, and we affirm.

Arkansas law establishes a preference for the natural parent in third-party custody cases and that preference must prevail unless it is established that the natural parent is unfit. *Robbins v. State*, 80 Ark. App. 204, 92 S.W.3d 707 (2002). This preference applies in guardianship cases as well. *Id.* Nevertheless, the rights of parents are not proprietary and are subject to their related duty to care for and protect the child; the law secures their preferential rights only as long as they discharge their obligations. *Dunham v. Doyle*, 84 Ark. App. 36, 129 S.W.3d 304 (2003). We review probate proceedings de novo, but we will

not reverse the decision of the trial court unless it is clearly erroneous. *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000). When reviewing the proceedings, we give due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Id.* Based on the testimony presented below, we cannot say that the trial court's decision was clearly erroneous.

Appellant Shaona Mizell and Billy Couey are the natural parents of N.C., who was born in 1992. Appellee Earlene Couey, Mr. Couey's mother, petitioned for guardianship over the person and estate of N.C. Mr. Couey consented to the petition, and the issues at trial centered on the fitness of appellant Shaona Mizell.

There was a great deal of evidence, found credible by the trial judge, that the mother was an alcoholic who by her own admission drank every day for thirteen years, sometimes in addition to taking prescription sedatives. The record shows that appellant has habitually driven intoxicated, sometimes with the child in the vehicle, sometimes allowing the child to drive the vehicle while appellant drank. A witness who described herself as appellant's former best friend testified that appellee Earlene Couey, the child's grandmother, raised N.C., caring for her in her home nearly every day until appellant separated from Mr. Couey in 2002. This witness further stated that she stopped associating with appellant after she "went wild," taking up to four Xanax pills and "chasing" them with beer. The witness stated that, during one such debauch, appellant, intoxicated and angry, took a pistol from the gun cabinet, said that she would "show all these M-F'ers," and shot the pistol right between the witness's feet. On another occasion, appellant told the witness that she had chased her brother "down the road with a gun" with the intent to kill him. There was testimony that on numerous occasions before 2002 appellant had been intoxicated to the point of a blind stupor, rendering her unable to see until the following day.

There was also evidence, found to be credible, that appellant had engaged in numerous instances of crude, bizarre, and lewd behavior in the presence of her young daughter. Several instances of such behavior were related by appellant's former friend, but one example will suffice:

In 1998, there was an accident that Billy had while riding a four-wheeler with [N.C.] and two other kids. I came upon the accident scene. It's just right below my house. I went out to where it was. It was between forty to fifty people out there. Shaona come running from across from where she lives at. She slammed a truck up in park and took off running. She didn't bother to go check on the kid. I was standing right there in front of the ambulance. Shaona was kind of right there in front of the ambulance, didn't bother to go check on the kid, [N.C.]. She said I gotta pee. And she said if all these people, if they haven't seen any P, [that's] their business. I am talking about a body part, her vagina. She said F these Mothers. M-F'ers. She said if they hadn't seen a P-word they fixing to see it now. She sat in the middle of the road, well, pulled her pants down and sat there and peed in front of all those folks. I mean, the crowd was just in shock. They just turned their heads. They couldn't believe it, because her daughter's sitting over there gushing blood....

The record further shows that appellee Earlene Couey, the child's grandmother, played a great and important role in raising the child and appears to have been the only stable and positive influence in the child's life. Appellee testified that appellant, her son, and their child lived with her, rent-free, prior to their separation, and that she cared for the child while appellant disappeared for days or weeks at a time. Appellee paid all of the child's expenses as well during that time without any contribution from appellant. This close relationship between appellee and N.C. began to change after appellant separated from Mr. Couey and married a twenty-nine-year-old man with eight felony convictions, including one conviction for possession of substances related to the manufacture of methamphetamine.

Appellant's argument that it was error to find her unfit turns on her assertion that there is a lack of evidence of continued drunken, lewd, and bizarre behavior since her marriage to

her present husband in 2003. However, although it is true that eyewitness evidence of such behavior is largely lacking for this period, we think that this can adequately be explained by the alienation of the child from appellee and the relative lack of opportunity to observe the mother's behavior since she moved from appellee's home and town. Nor do we think it unreasonable to discredit appellant's testimony that she quit her alcohol and drug abuse, without the aid of any treatment or program, during the very time that she had removed herself from appellee's observation. Furthermore, even though there is no direct evidence of utter drunkenness on the mother's part since her marriage in 2003, she has continued to demonstrate great instability, dismally unsound judgment, and a disregard for the child's welfare by marrying a twenty-nine-year-old man with eight felony convictions who is, by his own admission, currently a fugitive from justice, and by having, during the period of July 2002 through November 2004, lived in eight different residences in six Arkansas towns for periods of two to six months at each residence. We conclude that the evidence of the degree of appellant's instability and poor judgment is sufficient to support the trial court's finding of unfitness for the purpose of appointing a guardian.

Affirmed.

ROAF, J., agrees.

GLOVER, J., concurs.

DAVID M. GLOVER, Judge, concurring. I concur in the disposition of this case because our standard of review in guardianship cases requires me to do so; however, I write separately to express my concerns with the majority's slanted recitation of the evidence.

Shaona Mizell and Billy Couey lived together without benefit of marriage from the early 1990s until they separated in July 2002. During this time, they had a daughter, N.C., born on December 26, 1992, who was nine years old at the time her parents separated.

Paternity having not been established, Shaona, by law, was the legal guardian of N.C. Shaona took N.C. with her when she separated from Billy. In July 2003, OCSE filed an action against Billy for child support; in a February 2004 order, Billy's paternity was established and he was ordered to pay child support. In September 2003, Billy's mother, Earlene Couey, filed a petition for guardianship over N.C.'s person and estate; Billy consented to this request, but Shaona did not. In November 2004, the trial judge granted Earlene guardianship of N.C.'s person, but notably left guardianship of N.C.'s estate with Shaona.

The testimony of Shaona and other witnesses established that the twelve-year relationship between Shaona and Billy was accentuated by heavy drinking and other bizarre behavior by them jointly. The testimony further reflected that Shaona sought distance from Billy for herself and N.C., at which time her lifestyle began to improve, while his did not.

However, the majority gives Shaona no credit for any changes she made in her life after she separated from Billy. The majority specifically discounts Shaona's testimony that she had quit drinking and abusing her prescription drugs "without the aid of any treatment or program." However, this ignores the fact that Shaona's drug tests were negative, lending credence to her testimony that she had changed her ways. Shaona was "tried" for behavior that occurred while she was living with Earlene's son. The majority, as did the trial court, seems to believe that a person who makes poor choices while young and in a destructive relationship can never be rehabilitated and begin to make better choices.

Shaona's counsel established a "bright-line" time in January 2003 for the end of Shaona's bad conduct and the start of her new life away from Billy. The majority correctly points out that Shaona at this time married John Mizell, an eight-time felon, after she separated from Billy. John's testimony was that he had been convicted, by his estimation,

of eight nonviolent felonies by the time he was twenty-nine, had served two prison terms, and was on probation. However, the majority failed to note that he had not been in trouble since he was released from prison, he had never failed a drug test, his probation had never been revoked, and he testified that his probation officer was aware of the situation in Colorado. Though not referenced in the majority opinion, the unrefuted testimony was that John Mizell was actively involved in his step-daughter's life, which is more than can be said for her biological father. The majority has adopted the trial court's apparent failure to see the changes that have been made in John Mizell's life, instead focusing only on the fact that he too has some baggage from his past.

N.C. testified that she had always lived with her mother and that she preferred to live with her mother, even though she did want to visit her grandmother. While her stated preference was not binding on the trial court, it is certainly a factor to be taken into consideration, as is the parental preference for Shaona. By all accounts, N.C. is a well-adjusted child who makes good grades. N.C.'s current teacher testified that Shaona was involved in her schooling and checked up on her school activities.

In short, the record reflects that Shaona seems to have matured and changed her self-destructive behavior since separating from Billy. If she continues on this new path of behavior and brings a subsequent legal action to have the guardianship dissolved and her daughter returned to her care and custody, then I certainly believe that parental preference should be a consideration.

Further, I find the timing of Earlene Couey's guardianship petition, immediately following OCSE's attempt to require Billy to pay child support for N.C. to Shaona, to be suspicious - by all accounts, Shaona's behavior was much worse when she was living with Billy, yet Earlene Couey did nothing at that time. Rather, Earlene Couey waited until

Shaona left Billy, waited until Billy was being required to pay child support, and waited until Shaona married another man, the “bright-line” time in Shaona’s change of behavior, to seek guardianship of her granddaughter.